

ELVIN J. FOUNTAIN, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HALTER MARINE, INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
AETNA CASUALTY & SURETY	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (90-LHC-1877) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer as a joiner from 1966 to 1969, during which time he was was exposed to loud noise. Thereafter, for one eight-hour day in 1971, claimant worked for Gulf Boat Building Corporation (Gulf Boat), a maritime employer, where he was exposed to loud noise while using a nail gun. On August 22, 1989, claimant underwent an audiometric examination by Dr. Wold which revealed a 15.3 percent binaural hearing impairment. On November 13, 1989, claimant filed a claim against employer for a 15.3 percent binaural hearing impairment. Thereafter, on April 22, 1991, claimant underwent a second audiometric examination which revealed a 16.9 percent binaural hearing impairment.

A hearing was held on April 23, 1991, wherein the parties disputed causation, the nature and extent of disability, employer's liability for medical benefits, and attorney's fees. Employer additionally attempted to escape liability by establishing that it was not the responsible employer; specifically, employer submitted into evidence a report dated April 18, 1991, by Dr. Wold, wherein that physician stated that a nail gun produces enough impact noise to cause a permanent hearing loss, and that "there could be rare occasions when one day of nail gun noise could be injurious by causing noise trauma." See Emp. Ex. 14. In arriving at this opinion, Dr. Wold noted that many factors would have to be taken into account before this could be verified, that employer had stated its question hypothetically, and that until he could examine the individual and be knowledgeable of all of the details concerning this case, his answer is hypothetical. *Id.* In his Decision and Order, the administrative law judge set forth claimant's testimony regarding his exposure to noise levels during his employment with Gulf Boat, as well as Dr. Wold's April 18, 1991, report, and found that employer was not the last maritime employer to expose claimant to harmful noise; therefore, the administrative law judge denied claimant's claim for compensation against employer.

On appeal, claimant challenges the administrative law judge's finding that employer was not the last maritime employer to expose claimant to harmful noise. Specifically, claimant contends that the administrative law judge's finding that claimant was exposed to injurious stimuli while subsequently working for Gulf Boat is not supported by substantial evidence. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

In the instant case, the administrative law judge implicitly invoked the Section 20(a), 33 U.S.C. §920(a), presumption. To rebut the presumption, employer must present facts to show that exposure to injurious noise did not cause claimant's hearing loss. Employer also may escape liability by showing that claimant was exposed to injurious stimuli while employed for a subsequent, covered employer. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); see also *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976).

The responsible employer rule is set forth in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Under the Act, the employer responsible for a claimant's disability benefits is the last covered employer to expose claimant to injurious stimuli prior to the date upon which claimant becomes aware that he is suffering from an occupational disease arising out of his employment. *Id.*, 225 F.2d at 137; *Lins*, 26 BRBS at 62; *Susoeff*, 19 BRBS at 149. In the instant case, the responsible employer is the last maritime employer to expose claimant to injurious noise stimuli prior to his date of awareness, the earliest possible date of which is the date of the first audiogram, August 22, 1989.

Claimant, during his deposition, acknowledged that his use of a nail gun, which utilized a cartridge to project the nail and sounded like the shooting of a gun, had exposed him to loud noise during his employment with Gulf Boat. See Emp. Ex. 25 at 26-27. Additionally, claimant's own audiologist, Dr. Wold, stated that noise from a nail gun could be injurious by causing noise trauma.

See EX-14. In his decision, the administrative law judge concluded that the testimony of claimant and Dr. Wold justified a finding that employer was not the last maritime employer to expose claimant to harmful noise. Decision and Order at 3. It is well-established that all adjudicative and factfinding functions reside in the administrative law judge. See *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Thus, an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence, see *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). The administrative law judge's finding, based upon the testimony of claimant and Dr. Wold, that claimant was exposed to injurious stimuli subsequent to his employment with employer, is rational and supported by substantial evidence. Contrary to claimant's contention, Dr. Wold's statement, given in response to a hypothetical, that many factors must be considered before rendering an opinion as to causation, does not detract from the administrative law judge's finding that claimant was exposed to injurious stimuli, since that physician additionally stated that noise from a nail gun could be injurious by causing noise trauma. We therefore affirm the administrative law judge's determination that employer met its burden of proving that claimant was exposed to injurious levels of noise in subsequent maritime employment, and his consequent finding that employer is not the responsible employer. See *Avondale Shipyards*, 977 F.2d at 191-192, 26 BRBS at 114-115 (CRT).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge